REUSE IT AND LOSE IT: CALIFORNIA IMPOSES NEW RECYCLING LABELING REQUIREMENTS AND LIMITS PFAS USE

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U.S. Policy and Regulatory Alert

On 5 October 2021, California Governor Gavin Newsom signed a series of bills into law that have significant implications for the food and beverage industry, cookware manufacturers, restaurants, and a broader group of companies that manufacture, sell, or distribute products in the state. These measures are intended to reduce single-use plastic pollution, support state recycling goals, and eliminate the use of perfluoroalkyl and polyfluoroalkyl substances (PFAS) in children's products, food packaging, and cookware.

Companies that manufacture, sell, or distribute products in California will need to determine whether they are in compliance with these new laws, or if they need to make operational changes to their business before these laws go into effect. The legislation also authorizes responsible state agencies to issue new regulations implementing this legislation. Companies should be tracking implementation of these new laws to ensure they remain in compliance.

RECYCLING LABELING AND REGULATION OF SINGLE-USE PRODUCTS

SB 343 makes it a criminal violation to display a “chasing arrows” recycling symbol, or to otherwise direct a consumer to recycle a product, unless the product or package is regularly recycled and turned into new products.

- Products or packaging that are recyclable in at least 60% of the state and meet other statewide recyclability criteria will be eligible to use the symbol.
- A product or packaging is considered recyclable in the state if it “is of a material type and form collected for recycling by recycling programs for jurisdictions that collectively encompass at least 60% of the population of the state . . .”
- Under the new law, the California Department of Resources Recycling and Recovery (CalRecycle) must conduct and publish a material characterization study, on or before 1 January 2024, which will determine what products or packaging are eligible to use the “chasing arrows” symbol.
- Companies will have 18 months after the date of the updated CalRecycle characterization study or until 1 January 2024, whichever is later, to come into compliance with this regulation.
- An incorrect recycling label after this date will be considered deceptive or misleading labeling that is punishable as a criminal misdemeanor.

AB 1276 further regulates single-use plastics in the food industry, building on California's existing regulations concerning single-use plastic straws.

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- The new law requires consumers to explicitly request disposable utensils and single serve condiments from any “food facility,” including restaurants, food trucks, and any operation where food is consumed on or off the premises, prohibiting the food facility from simply providing them with every order or package.
- The law also prohibits the bundling or packaging of single-use utensils and condiments in a manner that would prevent the consumer from selecting the one desired. Fast food restaurants and food facilities at airports can ask if the customer wants such items.
- Further, third-party food delivery services must provide the option to request single-use utensils or condiments.
- Cities and counties must authorize a local enforcement agency to enforce these requirements on or before 1 June 2022.
- First and second violations result in a notice of violation, and subsequent violations are an infraction punishable by a fine of US$25 for each day in violation, not to exceed an annual total of US$300.

PFAS RESTRICTIONS

The new PFAS laws respond to developing concerns about the alleged toxicity and potential health concerns associated with the ubiquitous “forever chemicals,” including the U.S. Environmental Protection Agency's recent announcement of the first federal limits for PFAS in wastewater regulation.

AB 1200 prohibits the distribution, sale, or offering for sale of food packaging that contains PFAS, at or above 100 parts per million, beginning 1 January 2023. This includes PFAS components of intentionally added chemicals and PFAS that result when an added chemical breaks down.

- Manufacturers must use the “least toxic alternative” when replacing PFAS in food packaging. The “least toxic alternative” is undefined under the law and may be subject to further refinement through implementing regulations.
- AB 1200 also requires cookware manufacturers to list on product labels and online product listings the presence of certain intentionally added chemicals identified by the Department of Toxic Substances Control (DTSC) beginning 1 January 2024.
- Manufacturers must also include a statement on the label, in English and Spanish, letting consumers know how they can obtain additional information about these chemicals.
- Beginning 1 January 2023, cookware manufacturers must post on a website a list of the chemicals from the designated list that are present in their cookware.
- Selling, offering for sale, or distributing cookware in California is prohibited unless the manufacturer complies with these provisions.
- Violations of the new law can result in a misdemeanor conviction, punished by a fine of US$50 to US$1000, imprisonment for more than 6 months, or both in accordance with California Health and Safety Code Section 108295.

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AB 652 prohibits the manufacture, sale, or distribution in California of any new product designed for use by infants and children under 12 years of age (such as cribs, car seats, playmats , highchairs, and changing pads) that contain PFAS.

- The prohibition goes into effect on 1 July 2023.
- On or after that date, a manufacturer is required to use the least toxic alternative when replacing PFAS in children's products. Similar to AB 1200, the “least toxic alternative” is undefined.
- Violations can result in a misdemeanor conviction, punished by a fine of US$50 to US$1000 or imprisonment, in accordance with California Health and Safety Code Section 108295.

Companies affected by these new laws should closely track the forthcoming rulemakings implementing them, which will provide additional details regarding specific products and chemicals that will be prohibited or subject to additional regulation. Affected companies that do business in California, or whose products are sold or distributed in California, should start making plans to come into compliance with these regulations well in advance of the regulations' effective dates.

K&L Gates can assist companies seeking to navigate these new California requirements to ensure compliance with the new regulations, as well as make sure that companies stay well-informed of the changing state and federal regulatory landscape concerning PFAS regulations.

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